Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JACK B. BUSTER and A. LEE PETERSEN

Petitioners,

v.

RONALD E. GREISEN, HENRY P. HEAD and DAVID L. RATCHYE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

1. May a district court, in a case over which it lacks jurisdiction, sanction a party and his attorney for there conduct in a state court?

2. May a court of appeals affirm an imposition of sanctions on the basis of conduct which was not mentioned in the district court?

3. May a party who is represented by counsel be sanctioned by a district court, which lacks jurisdiction, for filing a "frivolous complaint in a state court?

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I. PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals filed March 26, 1997, rehearing of the amended judgment denied May 14, 1997, Case Nos. 95-36265 and 96-35264,[1] reprinted in the Appendix hereto, in order to review whether a federal district court, which lacks jurisdiction of the case, may sanction a party and his attorney for filing a "frivolous complaint" in a state court, and whether a court of appeals may uphold such sanctions on a basis not mentioned in the district court proceeding.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is being

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[1]The unamended opinion appears at 104 F.3d 1186.

timely filed in accordance with Rule 13.1 of this court.

III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant portions of constitutional provisions, statutes and rules pertaining to this petition are as follows:

Fifth Amendment to U.S. Constitution

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . ..

Tenth Amendment to U.S. Constitution

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

28 U.S.C § 2072

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, ...

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

. . . .

Fed. R. Civ. P. 11

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension or modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other

factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed or presented to the court unless, within 21 days after service of the

motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. . . .

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for violation of subdivision (b)(2). . . .

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of

rule and explain the basis of the sanction imposed.

IV. STATEMENT OF THE CASE

In January, 1993, Law Offices of A. Lee Petersen, P.C. was engaged to represent Jack B. Buster in the appeal of a judgment against him in Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994), rehearing en banc denied, cert. denied, 115 S.Ct. 935 (1994). A majority of the panel which heard the case affirmed the judgment. (ER 75 - Affidavit, pp. 1-2).[2]

In that case, Buster was held to be a fiduciary to an ERISA plan (referred to as the "Trust"). Consequently, all transactions with him in which the Trust purchased from him promissory notes secured by real estate deeds of trust were

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[2]"ER" refers to the Excerpt of the Record filed with the Court of Appeals.

prohibited transactions under 29 U.S.C. §1106, because, as a fiduciary, Buster was a "party in interest." That statutory section was incorporated into the trust instrument, but that instrument was never disclosed to Buster until the case was being litigated. However, the trustees had possession of the trust instrument, so, in Buster's view, they should have been at least equally liable to the Trust with him for breaches of their fiduciary duties in causing the Trust to engage in prohibited transactions. (ER 75 - Affidavit, p. 4). ERISA, in 29 U.S.C. §1109, establishes remedies for the benefit of the plan, but not for the fiduciaries to the plan against each other, so Buster could not hold his co-fiduciaries accountable in the federal action. Call v. Sumatomo Bank of California, 881 F.2d 626, 631 (9th Cir.

1989). Buster considered that he had dealt with the Trust on an arm's length basis, because he did not hold himself out as an investment advisor and he did not attempt to earn any money giving investment advice. If anyone had asked Buster for investment advice, he would have refused to give it and if they had offered him compensation for investment advice, he would not have accepted it. (ER 32 - Buster Affidavit, pp. 6-7). It did not occur to Buster that he could be considered an investment advisor or a fiduciary to the Trust because he was not told what funds the Trust had available to invest, what its investments were or its investment goals, and he was not shown the trust instrument relating to its functions. (ER 32 - Buster Affidavit, pp. 5-8).

Buster concluded that he had been deceived into dealing with the Trust on the

basis of being a fiduciary due to the failure of the persons named as defendants in this case to disclose to him factual information which would have enabled him to make a correct assessment of his position and to refrain from dealing with the Trust. (ER 32 - Buster Affidavit, pp. 8-9; ER 75 - Petersen Affidavit, pp. 8-9). As a result, Buster discussed with Petersen, over a period of several months, the deception which had been perpetrated and requested representation in a lawsuit to collect compensation for the damages which resulted from the deceptive failure to disclose facts which were important to Buster in the transactions. (ER 75 - Petersen Affidavit, pp. 8-9). The lawsuit was not filed to retaliate against the Trust; the Trust was not made a party. The lawsuit was filed to recover pecuniary damages for the torts

committed by the named defendants against Buster. (ER 75 - Petersen Affidavit, p. 9). After careful consideration and research, Petersen agreed to represent Buster in the proposed lawsuit. (ER 75 - Petersen Affidavit, p. 10).

The Complaint and Amended Complaint, alleging a cause of action for deceitful failure to disclose information the defendants had a duty to disclose, a tort recognized under Alaska law, were filed in the Superior Court for the State of Alaska (ER 1; ER 4 - Amended Complaint). The defendants removed the case to the United States District Court and the District Court denied a motion to remand to the state court (ER 7; ER 13).

Thereafter,the District Court granted the defendants' motion for summary judgment (ER 66) on the basis that Buster's claims

should have been a counterclaim in the prior litigation, thereby precluding litigation of issues which were or should have been litigated and, by restating the allegations of the complaint, the district court concluded that Buster's allegations did not state the tort as recognized in Alaska Supreme Court decisions and the Restatement (Second) of Torts. Judgment was entered in favor of the defendants (ER 67).

After that, the defendants filed a motion for attorneys fees asking that judgment for their full attorneys fees be entered against Buster and his attorney (ER 72). The motion was opposed (ER 75), but the District Court, by order dated February 21, 1996, granted the motion, awarding full attorneys fees to the defendants to be paid by Buster and his attorney (ER 78). Judgment was entered jointly and severally

against Buster and Petersen in the amount of $29,244 on February 22, 1996 (ER 79).

The Court of Appeals recognized that "Buster's complaint asserts only a claim for state law misrepresentation by nondisclosure." See, Appendix, pp. 8-11. The opinion then holds that the ERISA statute, 29 U.S.C. §§ 1109 and 1132(a), affords no jurisdiction of the federal court to litigate Buster's state law claim. The opinion then, inconsistently, holds that the claim is res judicata because it was previously litigated in the district court. See, Appendix, pp.13-14. But for precisely the reason that the district court had no jurisdiction, there was no opportunity for the claim Buster presented in this case to be litigated in the previous case. Under Alaska law issue preclusion applies only to issues which were or could have been

litigated previously. State v. Smith, 720 P.2d 40, 41 (Alaska 1986). Issue preclusion does not apply, because the parties were not the same. The prior case was between Buster and a trust entity. This case is between Buster and three individuals, who had no privity of interest in the trust's claim against Buster. The issue in the prior case was the trust's claim that Buster had breached fiduciary duties. The issue in this case is Buster's claim that three individuals deceived him by failing to make disclosures of facts they had a duty to disclose.

Only by disregarding the allegations of the complaint and restating them in ludicrous terms was the district court able to render them frivolous. But the Court of Appeals, in upholding the sanctions, held that it was well within the district court's

discretion to do that.

V. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

A. The Imposition of Sanctions in This Case is Unprecedented

Until this case, it has been settled law that a federal district court cannot impose sanctions for the filing of a complaint in a state court. If the case is removed to the federal court, any sanctions imposed can be only for conduct in the district court. In Hurd v. Ralphs Grocery Company, 824 F.2d 806, 808 (9th Cir. 1987), it was held that sanctions cannot be imposed under Rule 11 for filing a paper in state court. (Removal jurisdiction was not contested, so apparently it existed. In this case, removal jurisdiction did not exist, so the case should have been remanded to the state court without any consideration of sanctions, except for the wrongful

removal.) The reasons cited for the holding in Hurd included that such imposition of sanctions would encourage removal and defeat the purpose of keeping frivolous litigation out of the federal courts, the district court had no authority to give Rule 11 retrospective application, doing so would be analogous to applying an ex post facto law and Rule 11 does not purport to authorize sanctions for actions taken in state courts. See, also, West Lake Property Owners Association v. City of Thousand Oaks, 915 F.2d 1301, 1304 (9th Cir. 1990).

Other circuits appear to have held unanimously that a district court cannot impose sanctions for conduct that occurred before removal. Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987); Foval v.

First National Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988); In Re Summers, 863 F.2d 20, 21-22 (6th Cir. 1988); Worthington v. Wilson, 8 F.3d 1253, 1257-58 (7th Cir. 1993); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990).

B. The Sanctions Were Imposed for Conduct in the State Court

The complaint and amended complaint in this case were filed in the state court. (ER 1). The sanction imposed, as stated by the district court, was for filing a complaint to bring "this patently frivolous case, in bad faith, solely for purposes of harassment." See, Appendix, p. 22. The defendants asked for "an award of full attorneys' fees" and the court awarded full attorneys' fees. The defendants urged that "(s)uch an award is justified because this lawsuit was brought in bad faith for an

improper purpose... ." (ER 72--Memorandum, p.2). They did not ask for sanctions on any basis other than the filing of the lawsuit. That was the understanding of Buster and Petersen (ER 75, p.9) ("The defendants appear not to have suggested a violation of Rule 11 in this case as to any paper but the Complaint.") and that was all they defended. Thus, all parties involved, the defendants, the court and Buster and Petersen, understood that the sanctions were imposed for filing the complaint, and nothing else. No sanction was requested for any conduct that occurred in the district court.

This Court has pointed out that the Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Court to prescribe rules of practice and procedure for the federal courts. "The Court has no authority to enact rules that 'abridge, enlarge or modify

any substantive right.'" Cooter & Gell v. Hartmarx Corporation, 496 U.S. 384, 391, 110 S.Ct. 2447, 2453, 110 L.Ed.2d 359 (1990). The Federal Rules of Civil Procedure are to govern procedure "in the United States District Courts." Ibid. Rule 11 is to deter baseless filings "in district court." 496 U.S. at 393, 110 S.Ct. at 2454. "Neither the language of Rule 11 nor the Advisory Committee Note suggests that the Rule could require payment for any activities outside the context of the district court proceedings." 496 U.S. at 406, 110 S.Ct. at 2461. The filings of the complaint and the amended complaint in this case were outside the context of the district court proceedings.

The Supreme Court reiterated the same principles in Willy v. Coastal Corporation, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d

280 (1992), and pointed out that the judicial power of the United States as described in Article III of the Constitution cannot be extended by rule. Willy, 503 U.S. at 135, 112 S.Ct. at 1079. In that case sanctions imposed for creating a blur of absolute confusion by filing mountainous piles of unorganized documents and citing to nonexistent rules of law, Willy v. Coastal Corporation, 855 F.2d 1160, 1172 (5th Cir. 1988), while the case was in district court were upheld by the Supreme Court even though the Court of Appeals directed remand of the case to the state court. The Supreme Court pointed out that the sanctions were imposed for conduct in the district court and "did not signify a district court's assessment of the legal merits of the complaint." Willy, 503 U.S. at 138,112 S.Ct. at 1080.

In this case, there was no application

for sanctions until after the district court had decided the case on the merits, even though it had no jurisdiction to do so. The sanctions were imposed after and because of the district court's legal assessment of the merits of the complaint, contrary to the holding by this Court in Willy. The Court of Appeals" opinion is thus in conflict with Willy.

Federal courts, which are courts of limited jurisdiction, not only may not decide cases over which they lack statutory jurisdiction, they may not even "entertain" such cases. C. Wright, A. Miller & E. Cooper, 13 Federal Practice and Procedure, § 3522, at 62. It is not merely wrong but an unconstitutional invasion of powers reserved to the states to do so. Ibid. Consequently, a federal court has no way to know whether or not a complaint filed in a

state court and over which the federal court lacks jurisdiction is frivolous. To make such an assessment is a usurpation of power reserved to the states by the Tenth Amendment to the Constitution.

C. Amended Rule 11 Does Not Change Substantive Rights

As previously noted, retrospective application of Rule 11 to papers filed in a state court before removal is analogous to applying an ex post facto law. Hurd v. Ralphs Grocery Co., 824 F.2d at 808. It imposes punishment for an act which was not punishable when done. There is a substantive right not to be punished retrospectively for prior conduct. The courts have no authority to enact rules that abridge, enlarge or modify any substantive right. Rules can govern proceedings only "after" removal. Willy, 503 U.S. at 134,

112 S.Ct. at 1079. In this case, not only was the complaint filed in the state court, it was not advocated until after the motion for remand and motion for reconsideration had been denied, erroneously. Sanctions should noc be applied retrospectively to motions to remand which were well taken and did not violate any rule of the court and pleadings filed in the state court. Parties and attorneys have a substantive right not to be punished harshly for conduct which does not violate any rule of the federal court. Any amendment to Rule 11 allowing any such punishment would violate Article III of the Constitution, as discussed by the Supreme Court in Willy, 503 U.S. at 134, 112 S.Ct. at 1079. It would also usurp powers reserved to the states in the Tenth Amendment. This appears to be recognized in the Advisory Notes to subsection (b) of Rule

11 noting that the rule applies only to "papers filed with or submitted to the court." The note continues that obligations are not measured solely as of the time papers are filed with or submitted to the court but also for reaffirming and advocating positions taken in "those pleadings and motions after learning that they cease to have any merit." There is no suggestion that the court is authorized to reach back into the state court and impose sanctions on a party or attorney who never submitted those papers to the federal court and who are only in the court involuntarily and due to erroneous removal. It has been recognized that different standards may apply to parties and attorneys for being in a forum which they did not choose. Barrett v. Tallon, 30 F.3d 1296, 1302 (10th Cir. 1994). This principle should be even more

applicable when they are dragged wrongfully into a forum which has no jurisdiction.

D. The Sanctions Were Imposed Without Due Process of Law

Buster and Petersen have repeatedly asserted that they were denied due process of law with respect to the sanction. Rule 11, as amended, prescribes a procedure which is intended to comply with procedural due process. In subsection (c)(1), the rule requires that a motion for sanctions "describe the specific conduct alleged to violate subsection (b)." The motion filed in this case describes no conduct at all (ER 72). The motion refers to a memorandum which also is not very specific. Its most specific statement is "this lawsuit was brought in bad faith for an improper purpose and the issues involved had previously been adjudicated" (ER 72-memorandum at 2). There

was no other effort to comply with the notice requirement of subsection (c)(1) (A). Buster and Petersen concluded, "The defendants appear not to have suggested a violation of Rule 11 in this case as to any paper but the Complaint" (ER 75 at 9), and they defended on that basis. There was no specific notice that the filing of or defending a motion for summary judgment was "conduct alleged to violate subdivision (b)." Consequently, the most fundamental requisites of due process of law, notice and opportunity to be heard at a meaningful time and in a meaningful manner, were lacking. United States v. Alter, 482 F.2d 1016, 1024 (9th Cir. 1973). A hearing cannot be meaningful to a party who has not been given a reasonably adequate notice as to what the hearing is about. For this reason, a complaint in a civil matter, in order to

state a claim upon which relief can be granted, must give fair and adequate notice of each claim. No judgment is to be granted as to claims without notice and an opportunity to defend.

The only notice in this case of the application for sanctions was a motion and memorandum. The only defense was to the claims made in the motion and memorandum. The defendants asked for sanctions only on the basis of the filing of a lawsuit which they viewed as being brought in bad faith and for an improper purpose. The imposition of sanctions for any conduct except the filing of the complaint is a denial of due process of law. The imposition of retroactive sanctions for filing a motion for summary judgment was first suggested in the opinion of the Court of Appeals. There was no notice and no opportunity to defend

that proposition in the district court.

E. The Sanctions Do Not Comply With Rule 11

Under Fed. R. Civ. P. 11(c), a sanction award must be "appropriate." It may include requiring the sanctioned party to pay "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."

The sanctions imposed in this case include the attorney's fees and expenses incurred in wrongfully removing the case to federal court and in defending the motion to remand and the motion to reconsider the district court's erroneous order denying the motion to remand. To impose those expenses on Buster and Petersen is not appropriate. The expenses are not reasonable, because they never should have been incurred. The expenses were not incurred as a direct

result of Buster later filing a motion for partial summary judgment; they were incurred because the defendants' attorneys made a very obvious error of law, and persisted in it. It is not appropriate or reasonable to require Buster and Petersen to pay for other people's unforeseeable and obvious mistakes. It is much more appropriate and reasonable to award Buster his attorney's fees for obtaining a remand to state court, as allowed by 28 U.S.C. § 1447(c).

If the sanctions are sustained on any basis other than the filing of the complaint, then it must be determined what expenses and fees were incurred "as a direct result" of such other filing. No such determination has been made.

F. No Sanctions Should Be Imposed on Buster

Rule 11(c)(2)(A) proscribes the imposition of sanctions for filing a frivolous complaint against a party represented by counsel. And a complaint which is not frivolous cannot be filed for an improper purpose. Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990). Thus, if the complaint was frivolous, it could not be a basis for sanctioning Buster. If it was not frivolous, it could not have been filed for an improper purpose, so Buster could not be sanctioned for that reason.

VI. CONCLUSION

This case involves an issue of first impression which goes beyond is much more important than the issues considered by this court in Cooter & Gell v. Hartmarx

Corporation, supra, and Willy v. Coastal Corporation, supra; i.e., whether the amendments to Rule 11 in 1993 resulted in changes in substantive law which allow federal courts to impose sanctions for conduct which occurred in a state court? The opinion of the Court of Appeals in this case is a departure from principles of law which previously were settled in all of the circuits. For this and other reasons, this Court should exercise its supervisory powers to ensure that this unique case does not become a bad precedent for future cases.

This Court is urged to grant the writ and, upon hearing the case, to reverse the decisions of the Court of Appeals and the District Court.

Respectfully submitted the 6 day of August, 1997.

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A P P E N D I X

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK B. BUSTER,	)	
	)	Nos. 95-36265
Plaintiff-Apellant,	)	96-35264
	)	
A. LEE PETERSEN,	)	D.C. No. CV-94-00475-JKS
	)	
Apellant,	)	
	)	
v.	)	
	)	
RONALD E. GREISEN; HENRY P. HEAD; DAVID L. RATCHYE,	)	**ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**
Defendants-Apellees.	)	
	)	

Before: WRIGHT, BRUNETTI AND O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. Ap. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK B. BUSTER, *Plaintiffs-Appellant,*	)	Nos. 95-36265 96-35264
A. LEE PETERSEN, *Appellant,*	)	D.C. No CV-94-00475- JKS
v.	)	
RONALD E. GREISEN; HENRY P. HEAD; and DAVID L. RATCHYE, *Defendants-Appellees.*	)	ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND OPINION

Appeals from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
November 4, 1996-Seattle, Washington

Filed January 16, 1997

Amended March 26, 1997

Before: Eugene A. Wright, Melvin Brunetti and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

ORDER

The opinion filed on January 16, 1997 is amended as follows:

Slip opinion, page 469, 2nd line from the top, at the end of the sentence which concludes, "survives our jurisdictional ruling." add a new footnote, to read:

> 5 Buster contends that the district court erred by including in the sanction award fees and expenses incurred in pursuing the motion. We disagree. Although he states correctly the law prior to the 199.1 amendments to Rule 11. *see Pan-Pacific v. Pacific Union*, 987 F.2d 594, 597 (9th Cir. 1993), he ignores' the Rule's plain text, which now provides that "the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Fed.R.Civ.P. 11(c)(1)(A).

Renumber subsequent footnote.

The petition for rehearing has been considered and is **DENIED**.

OPINION

WRIGHT, Circuit Judge:

Appellant Jack Buster initiated this state law misrepresentation action in Alaska Superior Court. Asserting that the suit was an impermissible collateral attack on a prior federal judgment, Appellees Ronald Greisen, Henry Head and David Ratchye removed the case to federal district court, which granted their motions for summary judgment and sanctions. Buster challenges the district court's exercise of subject matter jurisdiction, grant of summary judgment and, with his attorney, A. Lee Petersen, the imposition of sanctions. We have jurisdiction under 28 U.S.C. 5 1291. We vacate the judgment for want of jurisdiction and affirm the award of sanctions.[1]

BACKGROUND

Greisen. Head and Ratchye were trustees of the Thomas, Head & Greisen Employees Trust, an employee trust fund subject to the Employee Retirement Income Security Act. 29 U.S.C. §§ 1001

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[1] Because we conclude that the district court lacked jurisdiction, we do not review the grant of summary judgment.

et. seq. In 1986 the Trust purchased deeds of trust secured by real property from Northern Financial, a general partnership comprised of Jack Buster and Terry Parks.

In 1989 the Trust sued Buster, Parks and Northern Financial, alleging that they had made material misrepresentations in the sale of three notes and claiming breach of fiduciary duty under ERISA. The district court ruled that Northern, Buster and Parks were fiduciaries to the Trust and that they had breached their fiduciary duty. The court awarded damages to the Trust in excess of $142,000, and we affirmed. *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 935 (1995).[2]

Buster then instituted this suit in Alaska Superior Court, alleging that the Trustees had failed to disclose information that would have put him on notice that he was a fiduciary to the Trust.

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[2] We recently affirmed a judgment in proceedings related to the Trust's efforts to execute on its judgment in the prior case. *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449 (9th Cir. 1996). Specifically we upheld the exercise of jurisdiction over the recipient of an alleged fraudulent conveyance by Buster, and affirmed the court's finding of contempt, entry of default and default judgment against Buster.

Contending that either ERISA's "complete preemption" doctrine or the district court's "ancillary jurisdiction" conferred federal question jurisdiction over Buster's complaint under 28 U.S.C. § 1331, the Trustees removed the case to federal court under 28 U.S.C. § 1441. After denying Buster's motion to remand, the court granted the Trustees' motions for summary judgment and sanctions.

DISCUSSION

A. Subject Matter Jurisdiction

We review de novo questions of federal subject matter jurisdiction. Kruse v. State of Hawaii, 68 F.3d 331, 333 (9th Cir. 1995).

1. Complete Preemption

[1] "[A] cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Felton v. Unisource Corp.*, 940 F.2d 503, 506 (9th Cir. 1991). A corollary to this requirement provides "that Congress may so

completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Taylor*, 481 U.S. at 63-64; *Felton*. 940 F.2d at 507. ERISA "completely preempts" a state law claim only when it both preempts the claim under 29 U.S.C. § 1144(a) and displaces the claim with its civil enforcement provision, 29 U.S.C. § 1132(a). *Taylor*, 481 U.S. at 66; *Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994). The Trustees' complete preemption argument fails because section 1132(a) does not displace Buster's claim.

[2] Buster's complaint asserts only a claim for state law misrepresentation by nondisclosure. Under section 1132(a), which authorizes suit by plan participants, beneficiaries, or fiduciaries, he could possibly bring only the following actions:[3]

> (2) . , . for appropriate relief under section 1109 of this title: [or]

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[3] Buster was found to be an ERISA fiduciary in the prior litigation and in that capacity would have standing to assert claims otherwise allowed by the statutory scheme. *See Harris*, 26 F.3d at 934; *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1027 (9th Cir. 1995).

> (3) . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Neither subsection displaces Buster's claim. Subsection (3) is inapplicable by its terms, because Buster seeks neither to enjoin any act or practice" nor "to obtain other appropriate equitable relief." He seeks only damages.

Subsection (2) incorporates section 1109. which provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations. or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .

Buster, however, is not bringing an *action on behalf of the plan* as required by the plain language of section 1109 and our decision in *Kim v. Fujikuwa*, 871 F.2d 1427, 1432 (9th Cir. 1989)(section 1109 "only establishes remedies for the benefit of the plan").

2. Ancillary Jurisdiction

Relying on *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), the district court determined that its authority would be undermined by allowing what it concluded was a retaliatory lawsuit to proceed in state court. Although we share the district court's concern with such attacks on federal judgments, and sympathize with litigants subjected to such suits, *Kokkonen* does not support this exercise of jurisdiction.

[3] In *Kokkonen* the Supreme Court noted that it had allowed the exercise of ancillary jurisdiction "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Id. at 380. However, the Court also cautioned that the doctrine is limited to "matters . . . that are *incidental to other matters* properly before [the court]." *Id.*

(emphasis added). The district court lacked this important prerequisite. An amended final judgment in the prior suit was entered in April 1993. but this action was not filed until September 1994. Because there was no action to which Buster's claim could be deemed ancillary, the court erred in taking jurisdiction. See also *Peacock v. Thomas.* 116 S.Ct. 862. 867 (1996)("In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction"); In re Hunter, 66 F.3d 1002, 1005 (9th Cir. 1995) (link to prior proceeding insufficient basis to assert ancillary jurisdiction over independent fraud action).

B. Sanctions

Buster and Petersen appeal the award of Rule 11 sanctions. We review for abuse of discretion. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

The district court found that this suit was "patently frivolous," brought in bad faith, and solely for the purpose of harassment in violation of Rule 11, which, in relevant part, provides:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -
>
> (1) it is not being presented for any improper purpose. such as to harass or cause unnecessary delay or needless increase in the cost of litigation:
>
> (2) the claim, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

In concluding that Buster's claim was both frivolous and brought for an improper purpose, the district court was well within its discretion.[4]

[4] "Frivolous" filings are those that are "both baseless and made without a reasonable and competent inquiry." *Townsend V. Holmun Consulting Corp.*, 929 F.2d 135X. 1362 (9th Cir. 1990)(en banc). The district court concluded that this suit was barred by the res judicata and collateral estoppel effects of the prior judgment. These findings are supported by the record, and a reasonable and competent inquiry would have led to the same conclusion. This action involves the same parties and the same

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[4] Buster's argument that the district court could not impose sanctions based upon a complaint filed in state court ignores the 1993 amendments to Rule 11. Although prior to the amendments conduct was measured only at signing, *see Hurd v. Ralphs Grocery Co.*, 824 F.2d 806, 808 (9th Cir. 1987), Rule 11 not authorizes sanctions for "presenting to the court (whether by signing, filing, submitting, or later advocating)" a document otherwise sanctionable. *See Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223, 227 n.5 (7th Cir. 1995); Developments in the Law - - Lawyers' Responsibilities and Lawyers' Responses, 107 Harv. L. Rev. 1547, 1635 (1994). Thus, as the Advisory Committee noted "if after a notice of removal is filed, a party urges in federal court the allegations of a pleading file din state court . . . . it would be viewed as 'presenting'-- and hence certifying to the district court under Rule 11--those allegations. " Buster has continued to urge the allegations in his complaint since removal.

Furthermore, Buster's motion for summary judgment, filed after removal, provides an independent basis for sanctions.

"transactional nucleus of fact" as the prior suit and it seeks to relitigate issues that were conclusively resolved in the prior suit. *See In re Grantham Brothers*, 922 F.2d 1438, 1442 (9th Cir. 1990)(collateral attack with no basis in law or fact is frivolous under Rule 11), *cert. denied*, 502 U.S. 826 (1991); *Roberts v. Chevron*, 117 F.R.D. 581 (M.D.La 1987) (bringing state court action attacking prior federal judgment and failing to dismiss after removal justified Rule 11 sanctions; reasonable inquiry would have shown that res judicata barred action). *aff'd*, 857 F.2d 1471 (5th Cir. 1988). The district court did not abuse its discretion in concluding that Buster's claim was frivolous.

[6] Buster and Petersen contend that our conclusion that the district court lacked subject-matter jurisdiction renders void the order awarding sanctions. The Supreme Court rejected this precise argument in *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992): "A final determination of lack of subject matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automat-

ically wipe our all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *See also Branson v. Nott*, 62 F.3d 287, 293 (9th Cir.)(that the district court lacked subject matter jurisdiction does not preclude it from imposing Rule 11 sanctions), *cert. denied*, 116 S.Ct. 565 (1995). The award of sanctions survives our jurisdictional ruling.[5]

[7] Finally, Petersen argues that he was not afforded due process before the imposition of sanctions. This argument itself borders on the frivolous.[6] Due process requires notice that the court is considering sanctions and an opportunity to be heard in opposition. *Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594. 597 (9th Cir. 1993). Buster and

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[5] Buster contends that the district court erred by including in the sanction award fees and expenses incurred in pursuing the motion. We disagree. Although he states correctly the law prior to the 1993 amendments to Rule 11, *see Pan-Pacific v. Pacific Union*, 987 F.2d 594, 597 (9th Cir. 1993), he ignores the Rule's plain text, which now provides that "the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.:" Fed.R.Civ.P 11(c)(1)(A)

[6] As does the assertion that the Seventh Amendment requires a jury trial before sanctions in excess of twenty dollars can be imposed.

Petersen were timely served with the Trustees' motion and filed a twelve-page memorandum in opposition with an attached eleven-page affidavit by Petersen. They had both adequate notice and an opportunity to be heard.

CONCLUSION

We vacate the district court's summary judgment and affirm the award of sanctions. Buster and Petersen shall bear the costs of appeal.

VACATED IN PART; AFFIRMED IN PART.

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Buster v. Greisen, et al
Case No. A94-0475-CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Patty Demeter, Case Management: 271-3235*

PROCEEDINGS: **ORDER FROM CHAMBERS**

Defendants Ronald E. Greisen, Henry P. Head, and David L. Ratchye (collectively called "Head") seek attorney's fees from Plaintiff Jack B. Buster ("Buster") and Buster's attorney, A. Lee Petersen, after successfully defending a lawsuit brought by Petersen against them on Buster's behalf. Docket Nos. 72 & 76. The motion is opposed. Docket No. 75. The parties have thoroughly briefed their respective positions and oral argument would not be helpful. Thus, the matter will be decided on this record. D. AK. LR. 7.1(I); United States v. Cheely, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992) (discussing the circumstances under which oral argument is allowed in this Court under a predecessor essentially identical rule.)

Jurisdiction in this case is based upon federal questions related to the Federal Employee Retirement Income Security Act ("ERISA"). See 29 U.S.C. § 1132(e) and § 1451(c) and 28 U.S.C. § 1331[7] To under-stand the context in which the motion for attorney's fees arose and the basis for this Court's jurisdiction, it is necessary to review this case's procedural history. Buster was a fiduciary for an ERISA plan operated by Head as trustee for the employees of a C.P.A. firm, Thomas, Head & Greisen. Head successfully sued Buster for breach of his fiduciary duties to the plan in this Court. See *Thomas, Head & Greisen Employees Trust v. Buster*, 24 F.3d 1114 (9th Cir. 1994). Thereafter, Buster brought this action for misrepresentation in state court against Head arguing that Head had, in effect, made misrepresenta-tions by omission. Buster argued that Head had not warned Buster that, in Head's view, Buster was an ERISA plan

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[7] Buster has been found to be a fiduciary under an ERISA plan, *Thomas, Head & Greisen*, 24 F.3d at 1115-20, and; in this action, seeks to relitigate his responsibilities to the plan, its trustees, and the other fiduciaries based on his contention that he was fraudulently led into becoming a fiduciary to the plan. This is clearly an action contemplated by ERISA. *See* 29 U.S.C. § 1451 (permitting an action by a fiduciary who is adversely affected by the act or omission of any party under the subtitle, *i.e.*, another fiduciary with respect to a plan for legal or equitable relief). Buster is suing for an omission to warn him about his fiduciary responsibilities to the plan. 29 U.S.C. § 1451(a)(1).

fiduciary who therefore could become liable to the plan for fraud under a heightened standard of care. Because failure to disclose opinions about the law would not qualify as misrepresentations, it is clear that Buster was, in effect, pleading a claim for civil entrapment, malicious prosecution, or abuse of process. This analysis is made more clear by review of the damages claimed which where, in essence, directly related to Buster's being sued by Head and losing the prior lawsuit. Head removed this action to this Court, arguing that it was an action by a plan fiduciary to determine the scope of his fiduciary responsibilities and obtain contribution from his co-fiduciaries for the damages he is obligated to pay the trust. *See* 29 U.S.C. § 1132(c) (giving this Court exclusive jurisdiction over actions by fiduciaries regarding their duties to plans, participants and trust-ees); *see also* 29 U.S.C. § 1109 (providing for liability for breach of a fiduciary duty). This Court recognized that the question was close and that the United States Supreme Court had specifically denied federal courts removal jurisdiction over actions for abuse of process brought in state court where the allegedly abusive process originated in federal court. *See Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). Nevertheless, this

Court denied Buster's motion to remand, finding that his action, if permitted, would be so chilling on the exercise of federal rights granted by ERISA that an exercise of jurisdiction by this Court was necessary to protect its judgments and allow litigants the protec-tion intended by ERISA. *See* order at Docket 13 which was affirmed on reconsider-ation at Docket No. 25. This Court found that the assertion of jurisdiction was necessary "to enable [the] [C]ourt to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676. (1994).

The case was referred to Magistrate Judge John Roberts who was administering Head's efforts to collect the judgment previously awarded against Buster. The parties filed cross-motions for summary judgment. Magistrate Judge Roberts re-viewed the record, heard oral argument, and recommended that judgment be entered in favor of Head and against Buster. In Magistrate Judge Roberts' report and recommendations, he concluded that Buster had not stated a claim against Head for misrepresentation under Alaska law and that his action was a disingenuous attempt to circumvent the Ninth Circuit's decision

in this case and harass Head for successfully suing Buster in the prior action. Docket Nos. 61 & 65. After a *de novo* review of the record and the exercise of its independent judgment, this Court agreed with Magistrate Judge Roberts and entered an order granting Head summary judgment. Docket No. 66. This Court found that Buster's action was barred by the doctrines of *res judicata* and collateral estoppel, because Buster's theory of civil entrapment would have been a compulsory counterclaim or an affirmative defense to the prior action.[8] Judgment was therefor entered in favor of Head and against Buster, and Head was awarded costs of action. Docket No. 67.

This Court has reviewed the motion for attorney's fees at Docket No. 72 and finds that the hours worked and the fees charged are

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[8] Magistrate Judge Roberts' invocation of *res judicata* and collateral estoppel, which was clearly correct on this record, suggests an alternate basis for jurisdiction; this Court's power to enjoin state court actions in which litigants seek to relitigage matters resolved against them in federal court. *See, e.g., Western Sys., Inc. v. Ulloa,* 958 F.2d 864 (9th Cir. 1992); *Amwest Mortgage Corp. v. Grady,* 952 F.2d 11623 (9th Cir. 1991). Alaska would not require mutuality of estoppel where the party against whom estoppel is urged had a full and fair opportunity to litigatge the issues in the prior proceeding. *Pennington v. Snow,* 471 P.2d 370 (Alaska 1970). Buster thoroughly litigatged the issues which doom this action in the proceeding before Judge von der Heydt and therefore is bound by all factual determinations made in that case: he was a fiduciary, he breached his fiduciary duty, he is liable to the plan, and he is not entitled to con-tribution from the other fiduciaries.

reasonable for comparable actions by men and women of comparable skill, education, and experience in this District. This Court therefore is prepared to award the sum requested: $29,244.00 against Buster. See 29 U.S.C. § 1451(e). Head also argues that the award should be made as a sanction against Buster and Petersen for bringing a patently frivolous action, in bad faith, solely for the purpose of harassing the Defendants and disrupting their reasonable efforts to collect the judgment previously awarded against Buster. See 28 U.S.C. § 1927, FED R. CIV. PROC. 11, D. AK. LR 1.3; *see also Cox v. Nasche*, 149 F.R.D. 190 (D. Alaska 1993) (discussing an award of attorney's fees against an attorney who litigated in bad faith).

Petersen should be jointly and severally liable for the attorney's fees to be awarded in this action. The motion gave him notice of the application, and he has made his defense. *See* Petersen's affidavit accompanying Buster's opposition at Docket No. 75; *see also* Docket No. 75 at 11.[9] This Court agrees with Magistrate Judge Roberts that Petersen has been disingenuous in his published remarks in this case.

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[9] Because the motion notified Petersen that fees were sought against him as well as his client, he has received the hearing contemplated by *Ulloa*, 958 F.2d at 873.

The only possible explanation for this lawsuit and Petersen's conduct is that he brought this patently frivolous case, in bad faith, solely for purposes of harassment. Petersen is not a new attorney. He is a former deputy United States Attorney who has practiced in this Court for many years. There is simply no excuse for his actions in this case. *See Cox*, 149 F.R.D. at 197-98. None of the possible excuses noted in Cox could possibly apply in this case. Petersen should share in liability for the judgment for fees rendered in this case. In *Cox*, this Court discussed in detail why it believes an award of attorney's fees is the appropriate measure of sanctions where an action or motion is brought in bad faith purely for purposes of harassment and to force an opponent to suffer economic waste by incurring unnecessary attorney's fees, because the fees incurred are a proper measure of the damage suffered.

IT IS THEREFORE ORDERED:

The motion for attorney's fees at Docket No. 72 is GRANTED. The Clerk shall enter judgment in favor of the Defendants and against Jack B. Buster and A. Lee Petersen jointly and severally in the amount of $29,244.00.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: February 21, 1996 SECRETARY'S INITIALS ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER. Any request for other information or for clarification, modification, or reconsideration of this Order, or for extension of time must be made in the form of a motion. See FED. R. CIV. P. 7(b)(1); D. Ak. LR 7.1(1). No one should telephone, fax or write to chambers regarding pending cases. The judge's secretary and law clerks are not permitted to discuss any aspect of this case, provide any infor-mation or communicate with any person including litigants, lawyers, witnesses and the general public regarding cases.